

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERASTO BARRIOS,	:	
	:	
Petitioner,	:	CIVIL ACTION
	:	NO. 09-6213
	:	
v.	:	
	:	
MICHAEL W. HARLOW, et. al.,	:	
	:	
Respondents.	:	

ORDER

AND NOW, this 3rd day of May, 2010, upon consideration of the Petition for Writ of Habeas Corpus (Doc. No. 1), the Revised Petition for Writ of Habeas Corpus (Doc. No. 3) (“the Petition”), Respondent’s Answer to Petition for Writ of Habeas Corpus (Doc. No. 6), the Report and Recommendation of United States Magistrate Judge Jacob P. Hart (Doc. No. 7), and Petitioner’s Reply to Respondent’s Supplement to Motion to Dismiss/Answer (Doc. No. 8), and after an independent review of the pertinent record, it is ORDERED that:

1. The Report and Recommendation of Magistrate Judge Hart is APPROVED and ADOPTED. The Court agrees with the Report and Recommendation that the Petition be dismissed as unexhausted. On December 23, 2009, Petitioner’s appeal counsel filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. That appeal was still pending when Petitioner filed his habeas corpus petition on February 5, 2010. A federal court will not address the merits of claims presented in a habeas corpus petition unless “the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A); Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995). Petitioner’s Supreme Court appeal was still pending at the time he filed his habeas corpus Petition, and he must give the state court the opportunity to

correct any constitutional violations.

2. The Petition for the Writ of Habeas Corpus (Doc. No. 3) is DISMISSED WITHOUT PREJUDICE to refile when the Pennsylvania Supreme Court has ruled on Petitioner's appeal.

3. All outstanding motions are DENIED as moot.

4. A certificate of appealability shall not issue because, for the reasons set forth in the Report and Recommendation, a reasonable jurist could not conclude that the Court is incorrect in dismissing the habeas petition.

5. The Clerk's Office shall close this case.

BY THE COURT:

/S/ Joel H. Slomsky, J.
JOEL H. SLOMSKY, J.